

TAMARACK CONSTRUCTION,)	AGBCA No. 99-108-1
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Appellant)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

 October 27, 1999

OPINION BY ADMINISTRATIVE JUDGE JOSEPH A. VERGILIO

Tamarack Construction (contractor) of South Lake Tahoe, California, filed this appeal with the Board on November 5, 1998. The respondent is the U. S. Department of Agriculture, Forest Service (Government). The dispute involves a contract, No. 91U9-8-8031, which required the reconstruction of a portion of roadway in the Eldorado National Forest, in Eldorado County, California.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The parties have submitted the case pursuant to Board Rule 11, without a hearing. In May and June 1999, the Board received sequential briefs, followed by a contractor response.

At issue in this appeal is the contractor's allegation that the presence of granite below soil constituted a compensable, type one, differing site condition.¹ The record does not demonstrate the existence of a type one differing site condition, that is, subsurface or latent physical conditions at the site which

¹ Through counsel, the contractor seeks relief under theories of defective specifications, superior knowledge, constructive changes, and for areas for which no dispute existed at the time the contracting officer issued the underlying decision. The Board lacks authority to reach the merits of such allegations, which involve facts outside of the original claim. 41 U.S.C. §§ 605, 606.

differ materially from those indicated in the contract. The contract does not suggest the absence of such granite; granite should have been anticipated below the surface. The contract places upon the contractor, not the Government, the risk of encountering ordinary conditions; that is, the contractor is obligated to complete performance at the contract price.

Accordingly, the Board denies this appeal.

FINDINGS OF FACT

The contract

1. Tamarack became the contractor after responding to a request for quotations (RFQ).² The terms and conditions of the RFQ and the prices offered by the contractor constitute the contract. (Exhibit D.3 at 7-94.) (All exhibits are in the appeal file, as supplemented by the contractor; the Board numbered the pages within each exhibit.) The contract, No. 91U9-8-8031, involves the Olgilby (also spelled Ogilby in the contract) Road, 95 ERFO (Emergency Relief Federally-Owned, 23 U.S.C. § 125) project; it requires the contractor to reconstruct approximately one-tenth of one mile of a roadway in the Eldorado National Forest in Eldorado County, California (Exhibit D.3 at 11, 15). As awarded, the pay items totalled \$58,718.75 with 30 days for performance (Exhibit D.3 at 7, 12-14).³ Before pricing its final quotation, the contractor visited the site (Exhibit C.22).

2. The contract incorporates the Differing Site Conditions clause from Federal Acquisition Regulation (FAR) 52.236-2 (APR 1984) (Exhibit D.3 at 39 (¶ H-1)). That clause states, in pertinent part:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

² Despite the actions of the contracting officer, in issuing a notice of award effective July 15, 1998 (Exhibit E.3 at 7), a contract did not arise without acceptance by Tamarack. 48 C.F.R. § 13.004(a) (1998) (“A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. . . . The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.”).

³ Two bilateral modifications increased the contract price and time for performance (Exhibit D.3 at 3-6, 8). It appears that the Government has paid the contractor \$78,074.03 (Exhibit D.1 at 1-2).

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

3. The contract incorporates the Site Investigation and Conditions Affecting the Work clause from FAR 52.236-3 (APR 1984) (Exhibit D.3 at 39 (§ H-1)). That clause states, in pertinent part:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to . . . (4) the conformation and condition of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made apart of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

4. The contract does not specify the soil conditions to be anticipated at the site.⁴ The work involves excavation several yards below the surface of a steep area in the Sierra Nevada mountain

⁴ Regarding the retaining wall, the contract specifies: "Suitable excavated material within the project limits shall be used as backfill material." And, "Prior to wall placement the foundation shall be level and smooth and compacted to 95% of [particular standards]." (Exhibit D.3 at 98 (sheet 4 of 10).) Despite the contractor's suggestions, the contractor has not demonstrated how these references reasonably indicate the absence of rock in the excavation areas. The first quotation implies that less than all excavated material may be suitable for backfill; the reference in the second quotation to a compaction level establishes a minimum level of acceptability and does not preclude the presence of rock as a suitable foundation requiring no compaction.

range (Exhibit D.3 at 95, 97-98 (sheets 1, 3, 4 of 10)). The contract requires the installation of a culvert drain near the wall system; the contract diagrams (sheet 6 of 10) expressly depict details for both an unstable foundation and a rock foundation (Exhibit D.3 at 100).

5. The excavation is required in order to erect a reinforced soil retaining wall. The contract incorporates by reference the Forest Service Specifications for Construction of Roads & Bridges (FSS) (April 1985) (Exhibit D.3 at 16 (¶ C-2.1)). The special project specifications in the contract dictate that excavation shall be in accordance with the requirements of section 206 of those specifications, as amended. (Exhibit D.3 at 16 (¶ C-2.1613A.01 & .06).) The section states, in pertinent part, that structure excavation shall consist of the necessary excavation required for the construction (FSS (¶ 206.01)). Moreover,

All rock or other hard foundation material shall be cleaned of all loose material and cut to a firm surface that is level, stepped, or serrated as approved by the Engineer. All loose and disintegrated rock and thin strata shall be removed. When the footing is to rest on material other than rock, excavation to final grade shall not be completed until just before the footing is to be placed.

(FSS (¶ 206.03).)

6. The contract incorporates the Payments under Fixed-Price Construction Contracts clause from FAR 52.232-5 (MAY 1997) (Exhibit D.3 at 44 (¶ I-1)). Regarding final payment, the clause specifies that the Government shall pay the amount due the contractor after “[p]resentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.”

Performance

7. During performance, the contractor encountered a vein of granite below a top layer of soil. The excavation occurred between August 5 or 6 and 12, 1998 (Exhibit C.2 at 2). The contracting officer’s representative described the excavation in a daily diary for August 8: “Excavation is into rock at this time. It is fairly ‘rotten & fractured’. It seems to break up without much effort.” (Exhibit C.15.) While topsoil covered 5-10 feet in depth and much of the 20-25 foot depth of the excavation was through rock, the contractor did not provide the Government with notice that the contractor deemed the granite to constitute a differing site condition until after excavation was completed (Exhibits B.12, C.3 at 2, C.5 at 2).

8. The record, including evidence discussed in Findings of Fact (FF) 7 and 19, does not factually support the contractor’s allegation that the presence of the granite resulted in it incurring more cost or time than anticipated to perform the excavation.

Release

9. The contractor signed, with a date of November 16, 1998, a release which provides:

In consideration of \$ 21,678.43+% the undersigned hereby releases the United States of America from any and all obligations arising under this contract and any modifications thereof except as reserved below.

Reservations:

We have filed a claim to appeal the c.o. decision on the above mentioned contract number, based on differing site conditions. We will be proceeding under the board's small claims procedure for claims under \$50,000.00. Should you have any questions I can be reached at

(Exhibit D.3 at 2.) The \$21,678.43 is the amount the contractor sought for a differing site condition in its "final payment" request submitted under a cover letter dated October 28, 1998 (Exhibit B.4) and in a request for a time extension and additional reimbursement dated August 29, 1998 (Exhibit B.12 at 1, Exhibit B).

10. The record contains no indication that the Government paid the contractor the \$21,678.43 identified in the release or made "final payment" as described in the payment clause (FF 6). Given the lack of proof positive and the on-going dispute, the Board concludes that the Government has not paid the contractor the consideration described in the release.

Dispute

11. By letter dated August 29, 1998, to the contracting officer, the contractor requests a time extension of 34 calendar days and an additional \$41,790.22. One element of the request is the assertion that a differing site condition existed in that granite was encountered which the contractor had not anticipated. For this the contractor seeks \$21,678.43 and an additional 9 calendar days for performance. (Exhibit B.12 at 1 (¶ 3), 6, 14.)

12. In a response to the contractor dated September 4, 1998, the contracting officer denies the request for time and money related to the existence of granite. In the letter, the contracting officer resolves other items of the contractor's request, save one for which the contracting officer seeks additional information. (Exhibit C.27.)

13. By letter dated September 12, 1998, the contractor indicates agreement with the contracting officer regarding all but two portions of the response of September 4 (FF 12). One area relates to that for which the contracting officer sought additional information. The other area relates to the presence of granite constituting an alleged differing site condition. (Exhibit B.9.) In submissions to the contracting officer dated September 14 and 16, 1998, the contractor elaborates upon its assertions regarding the two items, but no other items (Exhibits B.7, B.8).

14. By letter dated September 18, 1998, the contracting officer rendered the decision underlying this appeal. The determination addresses the two aspects of the contractor's submissions which remained in dispute (FF 12, 13). The contracting officer allowed \$7,242.82 and an extension of 8

days for the item for which the contractor sought \$9,542.97 and an extension of 8 calendar days.⁵ (Exhibit A at 1-2.) The contracting officer denied the request for money and for time for the alleged differing site condition relating to the presence of granite (Exhibit A at 2).

15. The contractor reveals the essence of its case in a letter dated October 14, 1998, to the contracting officer: “Based on what contractual information and drawings that were supplied to all potential bidders[, n]o one would have known that there was a pocket of granite 5-10 feet under the native soil[, u]nless one was Superman and had X-ray vision.” The contractor contends that it encountered “a problem that no one could have foreseen with the information that was provided.” (Exhibit B.5.)

16. On November 12, 1998, the Board received from the contractor a notice of appeal, dated November 5, which specifies that the appeal relates solely to the request for money and for time for the alleged differing site condition relating to the presence of granite.

17. In a submission to the Board dated December 3, 1998, the contractor purports to increase the amount of the claim to \$49,850.

18. In a letter addressed to the Board, dated January 27, 1999, the contractor states, in part, regarding its differing site condition claim:

It is the Government’s responsibility to ascertain whether or not there was subsurface rock formations and if the existence of such rock would adversely affect the performance of this contract. Neither the existence of the rock formation or even the possibility were indicated on the drawings or in the bid specifications made by the Forest Service and furnished to Tamarack as part of the bid package. The existence of the subsurface rock formation therefore constitutes a *“latent physical condition at the site which differ[ed] materially from those indicated in [the] contract”*. This is a Category 1 differing site condition.

In the letter, the contractor claims entitlement to \$59,549.18, said to reflect labor and equipment costs for an additional 22 days.

Additional information

19. In a declaration made under penalty of perjury, the operator of the excavator for the contractor specifies that upon site visits prior to commencing work, “I noticed lots of rock . . . and, again, told [the contractor] that he better get a rock clause. There was rock all around in that area, and I was sure I’d run into some of it while I was running the excavator.” Further, “I saw the rock when I visited the site and expected to run into substantial amounts during the excavation. As it

⁵ The decision notes that the contract will be so modified. (Exhibit A). On October 16, 1998, the contractor signed a bilateral modification, so altering the contract (Exhibit D.3 at 3-5).

turned out, I didn't have any trouble removing the rock, as it broke easily and the [excavator] ate right through it." (Exhibit C.0).

20. The record contains declarations made under penalty of perjury from two individuals who provided quotations higher-priced than the contractor. Each declarant anticipated the presence of rock and priced its quotation accordingly. (Exhibits C.1, C.4.)

21. The declaration of a Geotechnical Engineer, made under penalty of perjury, which remains uncontradicted in the record, supports the conclusion that one should have anticipated encountering bedrock at the site: "Slopes as steep as the Ogilby site are virtually unknown to have a soil thickness greater than 5 feet. Consequently, anyone excavating beyond five feet on such a steep slope should expect to encounter bedrock." (Exhibit C-5.) The declaration, made under penalty of perjury, of a geologist further supports the conclusion that the bedrock should have been anticipated at the location in the Sierra Nevada mountain range: "Generally, geologic conditions have not permitted the development of thick soil layers or depositional zones such as is often associated with alluvial basins. Therefore, it can be expected that most mechanical excavation activities will encounter rock and/or bedrock within the Sierra Nevada, and the Eldorado Forest is no exception." (Exhibit C-6.)

DISCUSSION

This appeal requires the Board to resolve the Government's assertion that the signed release limits the issues of entitlement and quantum properly before the Board. Also, in light of the contractor's attempt to expand the issues of entitlement and quantum beyond those presented to the contracting officer and in dispute at the time the contracting officer rendered a decision, the Board must address its jurisdiction. Finally, the Board must resolve the single claim of the appeal, that is, the contractor's claim to recover for a type one differing site condition because it encountered granite when excavating.

The release and Board jurisdiction

The record does not demonstrate that final payment occurred or that the Government provided the consideration necessary to make the release enforceable (FF 9, 10). Accordingly, the release does not limit the contractor's ability to here pursue a claim. Mingus Constructors, Inc. v. United States, 812 F.2d 1387 (Fed. Cir. 1987).

Two issues were and remained in dispute at the time the contracting officer issued the underlying decision. One relates to the contractor's assertion of entitlement to relief under the Differing Site Conditions clause regarding the presence of granite. The other issue relates to that for which the parties subsequently entered into a bilateral modification. (FF 14). Thus, at the time the contractor filed its appeal, one area of dispute existed, that relating to an alleging differing site condition arising from the presence of granite. That issue is the sole basis asserted in the notice of appeal (FF 16). Other areas of dispute and theories for recovery now asserted by the contractor were not presented to the contracting officer as remaining in dispute or factually differ from the original claim. Without an underlying claim, the Board lacks jurisdiction to resolve those matters. 41 U.S.C. §§ 605, 606.

Differing site condition

In order to successfully assert that a type one differing site condition existed under the clause (FF 2), the contractor, at a minimum, must demonstrate by a preponderance of the evidence the existence of conditions at the site which differ materially from those indicated in this contract. H.B. Mac, Inc. v. United States, 153 F.3d 1338, 1343 (Fed. Cir. 1998). The contractor has not met its burden.

The record belies the allegations of the contractor. The contract contains no indication that granite would be absent from the site, either by express language or by implication, as the contractor suggests (FF 4). The general clauses of the contract anticipate the possibility of encountering hard rock (FF 5). Veins of granite are ordinarily encountered in the vicinity of the work site (FF 21). The excavator operator for the contractor anticipated encountering the conditions which existed (FF 19). Other potential contractors anticipated the presence of rock (FF 20).

The contract places upon the contractor the risk of encountering the general and local conditions (FF 2, 3). The contractor seeks to shift these risks to the Government (FF 15, 18). Such a reformation is unwarranted. Because the conditions are those which the contractor should have anticipated encountering, the Differing Site Conditions clause does not enable the contractor to recover.

The contractor's failure to demonstrate that the existence of the granite caused an increase in the cost or the time to perform the contract (FF 8) serves as an alternative basis to deny relief.

DECISION

The Board denies the appeal.

JOSEPH A. VERGILIO

Administrative Judge

Concurring:

EDWARD HOURY

Administrative Judge

ANNE W. WESTBROOK

Administrative Judge

Issued at Washington, D.C.**October 27, 1999**